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Nos. 1016 and 1017

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 53) is reported in 58 F. Supp. 785.

JURISDICTION

The order of the district court sought to be reviewed was entered on January 11, 1945 (R.

56). The petition for a writ of certiorari was presented for filing in No. 1016 on January 17, 1945, and the like petition in No. 1017 was presented on January 23, 1945; and the petitioners shortly thereafter filed motions for leave to file these petitions. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

On March 5, 1945, this Court granted the petitions and requested counsel to discuss in their briefs and upon oral argument the question whether the district court's order "may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under section 262 of the Judicial Code" (R. 58).

QUESTIONS PRESENTED

(1) Whether the order of the district court denying petitioners' motion to dismiss the complaint for want of jurisdiction may appropriately be reviewed by this Court at the present stage of the proceedings by writ of certiorari under Section 262 of the Judicial Code.

(2) If the first question is answered in the affirmative, whether the district court's order was proper. This depends, in our view, upon whether the powers given the Federal Trade Commission by Section 5 of the Webb-Pomerene Act are investigatory and advisory, and merely supplementary to the other remedies provided by law for enforcement of the Sherman Act, or whether Section 5 impliedly repeals these remedies and

vests in the Federal Trade Commission exclusive primary jurisdiction to determine violations of the Sherman Act by export associations.

STATUTES INVOLVED

The pertinent provisions of the Act of April 10, 1918, 40 Stat. 516, sometimes called the Webb-Pomerene Act, 15 U. S. C. sec. 61 *et seq.*, are set forth in the Appendix, *infra*, pp. 56–59.

Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, familiarly known as the Sherman Act, 15 U. S. C. secs. 1, 2, 4, provide in part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty

> of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, under which the jurisdiction of this Court is invoked, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 238 of the Judicial Code, 28 U. S. C. sec. 345, provides in part:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> (1) Section 2 of the Act of February 11, 1903, "to expedite the hearing and determination" of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.
>
> * * * * *

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[1] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. * * *.

STATEMENT

On March 16, 1944, the United States brought a civil action under Section 4 of the Sherman Act against two unincorporated export associations, thirteen domestic producers of alkalis[2] (each a member of one of the defendant export associations), a British producer of alkalis, and a domestic subsidiary of the British corporation, charging them and their co-conspirators with having been engaged in a conspiracy in restraint of interstate and foreign commerce in alkalis, in violation of Section 1 of the Sherman Act (R. 2–6, 11–12). Two additional domestic producers of alkalis and a Belgian producer and a German producer were named as co-conspirators (R. 6–7).

The principal allegations of the complaint may be summarized as follows:

Prior to 1940 the defendant associations exported more than 95% of all alkalis exported

[1] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

[2] The word "alkalis" is defined to include soda ash (sodium carbonate), caustic soda (sodium hydroxide), and bicarbonate of soda (R. 7).

from this country (R. 11);[3] "all important" domestic producers, with one exception, are members of the associations (*ibid.*). The defendant British producer enjoys a virtual monopoly in the sale of alkalis in the British Empire, the co-conspirator Belgian corporation is the principal manufacturer of alkalis on the European continent, and the co-conspirator German corporation is the most important manufacturer in Germany (R. 8–9).

Each of the two defendant associations had filed a written statement with the Federal Trade Commission, as authorized by Section 5 of the Webb-Pomerene Act, for the purpose of claiming on behalf of itself and its members the immunities conferred by Sections 2 and 3 of that Act (R. 9, 10–11). By means of a series of cartel agreements, the parties undertook to control trade in alkalis throughout the world. The complaint alleges, *inter alia*, that (1) the parties agreed to assign certain areas as the exclusive market territory of particular concerns or groups of concerns, or to assign quotas to them in such areas, thus eliminating competition in foreign trade; (2) the parties also agreed that those who manufactured alkalis in other countries should not export their products to the United States; (3) competition by exporters from the United States,

[3] Due to war conditions and one resignation from membership in 1941, this percentage has since fallen to 75% (R. 11).

not parties to the conspiracy, was systematically suppressed by the parties; and (4) export quotas of producers of alkalis in the United States were manipulated by parties to the conspiracy for the purpose of maintaining prices in the domestic market (R. 11–31).

The conspiracy has resulted, as intended by the defendants, in—

(1) Wholly eliminating exports of alkalis to the United States by the defendant British producer and the two co-conspirator foreign producers;

(2) Wholly eliminating exports of alkalis from the United States by the defendant associations and their members and other domestic producers, to many markets of the world;

(3) Restricting exports by such persons to many world markets;

(4) Preventing independent domestic producers of alkalis from competing with the defendants and their co-conspirators in various markets of the world;

(5) Preventing independent exporters from exporting alkalis from the United States;

(6) Curtailing and limiting the production of alkalis in this country;

(7) Stabilizing, enhancing, and maintaining at uniform and arbitrary levels the prices at which caustic soda is sold in the United States (R. 30–31).

The defendants, other than the British corporation and its domestic subsidiary, moved in the district court for a dismissal of the complaint for alleged lack of jurisdiction of the subject matter of the action. The sole ground of the motion was that under Sections 2 and 5 of the Webb-Pomerene Act exclusive jurisdiction of the matters charged in the complaint is vested, in the first instance, in the Federal Trade Commission (R. 50–52). After the district court had entered an order denying the motion (R. 56–57), motions for leave to file petitions for writs of certiorari under Section 262 of the Judicial Code to review the district court's order were filed in this Court. The petitions for certiorari were granted and the cases ordered consolidated for argument (R. 57–58).[4]

SUMMARY OF ARGUMENT

I

This Court in granting or denying the common law writs authorized by Section 262 of the Judicial Code looks to the principles guiding judicial discretion in the use of an extraordinary remedy. The writ is most commonly issued by an appellate court when the action of an inferior court (1) is not subject to corrective review by any other means and (2) thwarts or tends to thwart appel-

[4] Petitioners in No. 1016 are United States Alkali Export Association, Inc., and its members. Petitioners in No. 1017 are California Alkali Export Association and its members.

late review. The writ may not appropriately be used as a substitute for appeal and will ordinarily be denied where the question raised is reviewable by the regular course of appeal or if the ruling below was interlocutory and the prescribed appellate procedure authorizes appeals only from final judgments.

In this case the applicable statute—the Expediting Act—permits appeals only from final judgments, and the question raised by petitioners can be reviewed on such appeal. Furthermore, a purpose of the statute was to preclude appeals from interlocutory rulings. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558.

While it may be appropriate to issue a writ under Section 262 if a prompt determination by this Court of the issue which is raised is of public importance (*Ex parte Peru*, 319 U. S. 578), it is doubtful whether in the present case immediate intervention by this Court in order to review the interlocutory ruling of the district court is of sufficient public importance to warrant departure from the legislative injunction against piecemeal appeals in this class of cases.

II

Any export association which goes beyond the limited immunity from the Sherman Act given by Section 2 of the Webb-Pomerene Act is subject to the prohibitions of the Sherman Act. The authority given the Federal Trade Commission by

Section 5 of the Webb-Pomerene Act to investigate violations of law by export associations, and to make "recommendations" concerning carrying on their business in the future in accordance with law, is of an investigatory and advisory nature, in supplement of the sanctions and remedies for enforcing the Sherman Act provided by prior legislation. The language of Section 5 of the Webb-Pomerene Act corresponds to provisions of the Federal Trade Commission Act conferring on the Commission purely investigatory and advisory powers; such provisions do not derogate from the enforcement powers conferred upon the Attorney General and the courts. The recommendations which the Commission is authorized to make are not given enforceability. Comparison of the *ex parte* investigations authorized by Section 5 with the detailed procedural provisions of those sections of the Trade Commission Act and of the Clayton Act which do give to the Commission primary jurisdiction of certain prohibitions of these statutes further indicates that Section 5 of the Webb-Pomerene Act did not vest in the Commission exclusive primary jurisdiction of violations of the Sherman Act by export associations.

The legislative history of the Webb-Pomerene Act confirms the Government's interpretation of the statute. Congress intended that the non-exempt activities of export associations should be fully subject to the pains and penalties of the

Sherman Act. Had Congress intended a reversal of its established policy of (1) leaving it to the courts to determine the meaning and application of the Sherman Act and (2) imposing upon the Attorney General the duty to enforce the Act, it is reasonable to assume that this would have received some notice and consideration in Congress. The silence of the record in this respect attests the absence of any such intent by Congress.

If a judicial proceeding under the Sherman Act against an export association is conditional upon the happening of all of the contingencies set forth in Section 5 of the Webb-Pomerene Act, the criminal penalties of the Sherman Act are rendered inapplicable to such associations and are thus repealed as to them by implication. Under petitioners' construction of Section 5, the unqualified jurisdiction of the district courts over civil proceedings to enforce the Sherman Act would also be converted into a conditional and contingent jurisdiction and the prior grant of such jurisdiction would *pro tanto* be repealed by the later Act. It is a settled principle, however, that repeals by implication are not favored.

In situations analogous to that here presented this Court has declined to construe legislation conferring authority upon an administrative body as qualifying the power of the Attorney General to institute, and the power of the courts to entertain, the proceedings authorized by Congress for en-

forcement of the Sherman Act. See *United States v. Borden Co.*, 308 U. S. 188.

ARGUMENT

Petitioners do not question the holding of the district court that, under the allegations of the complaint, they are not within any immunity from the Sherman Act given by Section 2 of the Webb-Pomerene Act (R. 55); nor do they deny that, under these allegations, they have been violating the Sherman Act. Their sole contention is that Section 5 of the Webb-Pomerene Act, by authorizing the Federal Trade Commission to investigate possible violations of the Sherman Act by export associations and to make recommendations, based on such investigation, as to how an offending association may readjust its business so that it may thereafter be conducted in accordance with law, deprives the district courts of jurisdiction of any proceeding under the Sherman Act against an export association unless or until the Commission has made recommendations pursuant to Section 5 and these recommendations have not been complied with.

I

THE ORDER OF THE DISTRICT COURT DENYING PETITIONERS' MOTION TO DISMISS THE COMPLAINT MAY NOT BE APPROPRIATELY REVIEWED AT THE PRESENT STAGE OF THE PROCEEDINGS BY WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE

We take as the premise of our argument that under Section 262 of the Judicial Code, 28 U. S. C.

sec. 377, this Court is authorized "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of" its jurisdiction "and agreeable to the usages and principles of law." Issuance of common law writs under this provision rests within the sound discretion of the Court; and, in cases other than those in which the Court has original jurisdiction, a writ may be issued only in aid of the Court's appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582–584; *Whitney* v. *Dick*, 202 U. S. 132, 136, 140. The question presented is not whether this Court has power to grant the writ but whether, in the light of all the circumstances, this is an appropriate case for the exercise of its discretionary power.

The criteria governing exercise of this power are well-settled. The Court will "look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26. If no action or omission on the part of the inferior court "has thwarted or tends to thwart appellate review" of its ruling, this is an important consideration militating against issuance of the writ; and while a function of the writ "is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute" (*ibid.*). A traditional use of the writ has been

to confine an inferior court to its prescribed jurisdiction or to compel it to exercise its authority when under a duty to do so, but even in such cases appellate courts are "reluctant to interfere" with a lower court's decision of a jurisdictional question which is "reviewable in the regular course of appeal" (*ibid*).

"Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." *Id.*, p. 30. This principle is not confined to criminal cases. In a civil proceeding Chief Justice Marshall pointed out that to grant the writ in such a situation would be a "plain evasion" of the Congressional enactment that only final judgments be brought up for appellate review, and said that the effect of this mode of interposition would be that "the same cause might come before this court many times, before there would be a final judgment." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569.

In *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274, this Court said that the rule that a writ under Section 262 should not do service for an appeal "must be strictly observed if orderly appellate procedure is to be maintained", but that the writ may be used in "exceptional

cases where, because of special circumstances," it "may fairly be said to be reasonably necessary in the interest of justice".

We believe that the circumstances of this case do not warrant invocation by this Court of its extraordinary powers under Section 262 for the purpose of reviewing at this stage of the litigation the interlocutory order entered by the district court. The Court's appellate jurisdiction in this class of cases depends upon Section 238 of the Judicial Code, 28 U. S. C. sec. 345. The language of that section is significant:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise;* * * * [Italics added.]

The present case falls within the first of the five Acts enumerated in Section 238, namely, Section 2 of the Expediting Act of February 11, 1903 (*supra*, pp. 4–5). In the latter Act Congress explicitly provided that appeals in equity cases brought by the United States under the Sherman Act can be taken only to this Court and only from the "final" decree of the district court. This Court has said that a purpose of the Expediting Act was to bar any appeal from an interlocutory ruling. In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558, the Court, after referring to the delays in ob-

taining final adjudication in Sherman Act cases under prior appellate procedure, said:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree.

See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142.

The *Roche* case held that, in view of the statutory provision that (with some exceptions not material) appeals lie to circuit courts of appeals only from final judgments of district courts,[3] the circuit court of appeals in that case had abused its discretion in granting a writ under Section 262 to review an interlocutory ruling of the district court. Where, as in the instant case, a special statute governs appellate review and limits such review to final judgments, there would seem to be even less basis for circumvention, by grant of a writ under Section 262, of the prescribed appellate procedure.

The question of the jurisdiction of the district court which the present petitioners seek to bring

[3] Judicial Code, Sec. 128, 28 U. S. C. sec. 225 (a).

before this Court can be reviewed on appeal from any final judgment entered in the cause. Petitioners therefore cannot support grant of the writ under Section 262 upon the ground that this is the only means by which they can obtain appellate review of the jurisdictional question which they have raised.

It is immaterial that trial of the present case might be lengthy, costly, and inconvenient and that immediate review might establish that the district court was without jurisdiction. Such "inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable". *Roche* v. *Evaporated Milk Assn.*, at p. 30.

That the question raised goes to the jurisdiction of the inferior court is not ordinarily considered sufficient ground for grant of an extraordinary remedy if, as in this case, such question is reviewable under the prescribed appellate procedure (*supra*, pp. 13–14). See also *Whitney* v. *Dick*, 202 U. S. 132, discussed *infra*, pp. 21–22. Nor do the decisions indicate that where the question decided below was one of first impression this circumstance furnishes occasion for the grant of such remedy.

There remains for consideration the question whether the case is of such extraordinary public importance that this Court should promptly de-

termine the question raised by petitioners. *Ex parte Peru,* 318 U. S. 578. As to this, the relevant factors appear to be: (1) The respective jurisdictions of the federal courts and of a Governmental agency are in issue. (2) This question, while it remains unsettled, may affect to some degree the extent to which those engaged in the export trade utilize export associations organized to obtain the immunity given by Section 2 of the Webb-Pomerene Act. (3) Although the Government does not presently contemplate institution of any other proceeding involving the same jurisdictional question, it concedes that occasion for bringing such a proceeding may arise prior to this Court's determination of any appeal taken from the district's final judgment in the instant case.

We would not suppose that immediate review by this Court is, by reason of the above considerations, of such public importance that it would be an appropriate exercise of discretion to grant a writ under Section 262 to review an interlocutory ruling (reviewable on appeal from final judgment), in circumvention of the statutory provisions authorizing appeal in this type of proceeding only from final judgments and precluding piecemeal appeals from interlocutory orders.

On the question of the public importance of prompt final adjudication of the issue presented, prior precedents, necessarily resting on their

peculiar facts, are not of much value. *Ex parte Peru* was a proceeding *in rem* against a vessel of a friendly foreign Government and our Department of State had supported the immunity from attachment asserted by the foreign Government and had thus, in effect, declared that "the continued retention of the vessel [by the district court] interferes with the proper conduct of our foreign relations." See 318 U. S. 578, 589.

In *Ex parte United States*, 287 U. S. 241, as in *Ex parte Peru*, the question chiefly considered and decided was not whether the circumstances were such as to make it appropriate to issue a writ under Section 262, but whether this Court should decline to issue the writ because application therefor could be made to the circuit court of appeals to which direct appeal in the cause lay. In *Ex parte United States* the district court had refused to issue a bench warrant for the arrest of a person against whom there had been returned an indictment fair on its face. An extraordinary writ under Section 262 was the only available remedy to prevent a plain miscarriage of justice which, if not corrected, would thwart appellate jurisdiction of the cause.

It is pertinent to suggest that grant of certiorari in the present case may lead to many applications for writs under Section 262 in Sherman Act proceedings. In the short time which has elapsed since this Court granted the present peti-

tions for certiorari, the defendants in another Sherman Act proceeding have applied to this Court for certiorari under Section 262 to obtain review of an interlocutory ruling.[6]

We point out, finally, that the cases in which this Court has issued certiorari under Section 262 furnish no precedent for grant of that writ in the instant case. The most common use of the writ has been in cases where the only appeal from a decision of a district court was to the circuit court of appeals and that court had denied appeal to it.[7] Such denial operated to thwart appellate review, and correction of error by extraordinary remedy was therefore appropriate. This was also the situation in *In re Chetwood*, 165 U. S. 443, where this Court issued a writ of certiorari under Section 262 to review orders of a federal trial court which had prohibited the petitioner from prosecuting writs of error to this Court from decisions of a State court and had adjudged the petitioner in contempt for violating such orders.[8]

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[6] See applications of DeBeers Consolidated Mines, Ltd., et al., and Societe Internationale, etc., Du Congo, et al., filed April 6, 1945.

[7] *In re 620 Church Street Corp.*, 299 U. S. 24; *Holiday* v. *Johnston*, 313 U. S. 342; *Steffler* v. *United States*, 319 U. S. 38; *House* v. *Mayo*, No. 921, this Term, decided February 5, 1945.

[8] The Court there said (p. 462): "Judgments in proceedings in contempt are not reviewable here on appeal or error

Instances in which this Court has issued certiorari under Section 262 to review a decision of a circuit court of appeals in a case coming before that court under applicable appellate procedure[9] involved no departure from the policy established by Congress to confine appellate review, with specified exceptions, to the final judgments entered by district courts.

There is likewise no departure from that policy when this Court issues certiorari under Section 262 to review a writ issued by a circuit court of appeals under the same section. Two cases in which this has occurred are, we believe, of some significance. In *Whitney* v. *Dick*, 202 U. S. 132 the circuit court of appeals had issued a writ under Section 262 to reverse a judgment of conviction upon the ground that the district court was without jurisdiction. This Court, in reversing the action of the circuit court of appeals, held that since the jurisdictional question could be raised in the circuit court of appeals by writ of error, review thereof by that court through issuance of an extraordinary writ under Section 262 was erroneous. The Court said (p. 140): "There must be 'circumstances imperatively demanding' a departure from the ordinary remedy

[citing cases]; but they may be reached by certiorari in the absence of any other remedy."

[9] *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

by writ of error or appeal." It also said (*ibid.*) that the reasons prompting the improper issuance of certiorari in the case were similar to those frequently prompting writs of habeas corpus, namely, "to put an end to the litigation by some short summary process" rather than to proceed in "the orderly way" by writ of error, and that the Court had "repeatedly held against this procedure."

In *McClellan* v. *Carland*, 217 U. S. 268, on the other hand, application had been made to the circuit court of appeals for a writ of mandamus directed to a federal district judge to require him to vacate certain orders which he had issued staying proceedings in an action pending before him until final adjudication of the issues involved in a proceeding about to be instituted in a State court. Since such action by the trial court operated to prevent determination of the cause and thwarted appellate review thereof, this Court held that the circuit court of appeals had erred in not issuing the requested writ under Section 262.

II

THE POWERS RESPECTING EXPORT ASSOCIATIONS GIVEN TO THE FEDERAL TRADE COMMISSION BY THE WEBB-POMERENE ACT ARE PURELY INVESTIGATORY AND ADVISORY, AND THESE POWERS ARE IN AID OF, NOT IN SUBSTITUTION FOR, THE REMEDIES AND SANCTIONS GIVEN BY THE SHERMAN ACT AGAINST VIOLATORS THEREOF

A. *The Applicable Provisions of the Webb-Pomerene Act*

The Webb-Pomerene Act deals with associations [10] organized for and engaged solely in export trade. The basic provisions of the Act are those of Section 2.[11] This section provides that the Sherman Act shall not be construed as rendering illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such trade, or any act or agreement by it in the course of such export trade, provided (1) that—

> such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association

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[10] Section 1 of the Act (*infra*, p. 56) defines the word "association" as meaning "any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations."

[11] The full text of Sections 2 and 5 of the Act is set forth in the Appendix, *infra*, pp. 56–59. See, generally, Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 Col. L. Rev. 805.

and (2) that—

> such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

These provisos fix the boundaries of the exemption from the Sherman Act given to export associations. Briefly stated, they limit the exemption to combinations, called associations, which confine themselves, both in objective and in actual practice, exclusively to export trade and which do not restrain either domestic trade or the export trade of their domestic competitors. Under Section 2, therefore, such associations and their acts and agreements which are not within the limits of the immunity specified by this section are in the same position as if the Webb-Pomerene Act had never been passed; they are subject to all the prohibitions of the Sherman Act and to its criminal and civil sanctions. The clear demarcation, expressed by the language of the statute, between immunity under the Sherman Act for conduct affecting exclusively export trade (and not in restraint of export trade of domestic competitors) and non-immunity under the Act for other types

of activities of export associations and their members was, as we shall show later (*infra*, pp. 39–44), deliberately intended by Congress when it enacted this legislation.

Although Section 2 carefully defines the limits of the immunity which it gives (and thereby implicitly negatives the grant of any further immunity), petitioners contend that Section 5 of the Webb-Pomerene Act has the effect of suspending and rendering inoperative, as to export associations, all sanctions and remedies given by the Sherman Act against those who violate its provisions, unless and until certain steps and proceedings authorized by Section 5 of the Webb-Pomerene Act have occurred. By virtue of Section 5, it is contended, "primary" jurisdiction to determine the application of the Sherman Act to export associations has been vested in the Federal Trade Commission.

Section 5, upon which petitioners rely, is in three paragraphs. The first paragraph requires every export association to file with the Commission, within 30 days of its creation and annually thereafter, data as to its charter, officers, members or stockholders, and the location of its offices. Such association must also furnish the Commission such information as it may require concerning the association's business practices, and its relation to other associations, corporations and individuals. An association which fails to ob-

serve these requirements loses the immunity given by Section 2 of the Act and is also liable to forfeit to the United States $100 for each day of delinquency.

The second paragraph of Section 5 provides that whenever the Federal Trade Commission has reason to believe that an export association has done any of the things specified in the provisos of Section 2, the Commission shall conduct an investigation. If the Commission concludes, upon investigation, that there has been a violation of law, it "may" make to the association "recommendations" for the readjustment of its business in order that it may thereafter maintain its organization and conduct its business "in accordance with law". If the association fails to comply with these recommendations the Commission shall refer its findings and recommendations to the Attorney General for such "action thereon" as he may deem proper.

The third paragraph of Section 5 provides that for the purpose of enforcing these provisions the Commission shall have all the powers, so far as applicable, given it by the Federal Trade Commission Act.[12]

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[12] To complete the outline of the Act: Section 1 defines certain terms used in the Act. Section 3 provides that Section 7 of the Clayton Act shall not prohibit acquisition of stock of an export association unless the effect may be to restrain trade or substantially lessen competition "within the United States". Section 4 makes Section 5 of the Federal

It should be noted that the Webb-Pomerene Act, apart from its requirements as to filing or furnishing certain information, imposes no duties or prohibitions of any kind. An association which does not stay within the limits of the exemption given by Section 2 violates, not the Webb-Pomerene Act, but the Sherman Act. The former Act is therefore not one in which Congress has created a new wrong or imposed new substantive obligations, as to which it might be appropriate to commit to an administrative agency initial determination of the scope of the conduct proscribed or prescribed.

Under the Sherman Act, it is the courts which determine the scope of its prohibitions. This had been the policy of Congress for some 20 years prior to passage of the Webb-Pomerene Act. For Congress to provide that determination of the scope of the prohibitions of the Sherman Act should, in the case of export associations, be exclusively determined by an administrative agency would constitute a major change in legislative policy. It would also be, as we point out later (*infra*, pp. 35–36), a repeal by implication of the provisions of prior legislation vesting in the Attorney General power to bring proceedings to

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Trade Commission Act applicable to unfair methods of competition in export trade even though the acts constituting the unfair methods are done outside the territorial jurisdiction of the United States.

enforce the Act and vesting in the courts jurisdiction of such proceedings.

A heavy burden therefore rests upon petitioners in supporting their interpretation of the Webb-Pomerene Act. Not only should there be forthcoming persuasive evidence of intent by Congress to reverse a long-continued legislative policy but petitioners must square their interpretation with the "cardinal principle of construction that repeals by implication are not favored" (*United States v. Borden*, 308 U. S. 188, 198). We submit that neither the provisions of the Webb-Pomerene Act nor its legislative history support petitioners' interpretation and that, if we look to these sources to determine Congressional intent, they both point directly against the construction advocated by petitioners.

B. *The Webb-Pomerene Act Gives to the Commission Investigatory and Advisory Powers Respecting Violations of the Sherman Act by Export Associations, in Supplement of the Remedies Against Such Violations Provided by the Sherman Act*

The Webb-Pomerene Act was passed within four years after adoption of the Federal Trade Commission Act. In determining the nature of the authority given the Commission by Section 5 of the Webb-Pomerene Act, it is significant that the powers conferred upon the Commission under its basic statute show that Congress conceived of

the Commission as being largely, if not primarily, an investigatory and advisory agency, aiding, in this capacity, enforcement of the antitrust laws by the executive branch of the Government and the courts. The relatively minor extent to which these functions of the Commission have actually been utilized should not obscure the view of the Commission's role entertained by Congress in the early stages of the Commission's development.

Section 6 of the Federal Trade Commission Act (15 U. S. C. sec. 46) authorizes the Commission—

(a) To gather information concerning and to investigate the organization, business, practices and management of any corporation[13] engaged in interstate commerce;

(b) To require of such corporations the filing of annual and special reports, and answers to specific questions, furnishing information concerning such matters;

(c) Whenever a final decree has been entered against a corporation in an equity suit brought by the United States under the antitrust laws, to investigate the manner in which the decree has been carried out, either upon its own initiative or upon application by the Attorney General, and to transmit to him its "findings and recommendations";

(d) Upon the direction of the President or either house of Congress to investigate and report

[13] Banks and common carriers subject to the Interstate Commerce Act are excepted.

the facts relating to any "alleged violations of the antitrust Acts" by any corporation;

(h) To investigate trade conditions in and with foreign countries where combinations or practices of manufacturers or traders may affect our foreign trade, and to report to Congress such "recommendations" as it deems advisable.

Subsection (e) of Section 6 is particularly important here because its language is substantially incorporated in the second paragraph of Section 5 of the Webb-Pomerene Act. Subsection (e) reads:

> Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

Section 7 of the Trade Commission Act provides that in any equity suit brought by the United States under the antitrust laws the court may, upon conclusion of the testimony and if it believes that the United States is entitled to relief, refer the suit to the Commission "as a master in chancery" to report an appropriate form of decree, which report, when made, the court may adopt or reject in whole or in part.[14]

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[14] Sections 8, 9, and 10 of the Act are in aid of the foregoing powers. Section 8 provides for the furnishing of in-

Except for Section 5, which authorizes the Commission to issue orders against unfair methods of competition, all of the powers given to the Commission by the Act are investigatory or advisory in character.[15] In carrying out these functions the Commission is given no power to make any determination binding upon the executive branch of the Government, upon the courts, or upon private parties. Obviously the grant of these powers to the Commission does not curtail the authority given the Attorney General by the Sherman Act to bring proceedings to enforce the Act and does not curtail the jurisdiction of the courts to entertain such proceedings.

We submit that when Section 5 of the Webb-Pomerene Act likewise conferred upon the Commission authority to investigate violation of the Sherman Act by an export association, to make recommendations as to how such an association might readjust its business so as to bring it in conformity with the law, and to report its findings and recommendations to the Attorney General if the association did not comply with these

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formation to the Commission by other branches of the Government. Section 9 authorizes the Commission to require testimony or the production of evidence. Section 10 penalizes those who wilfully fail to testify or produce evidence and who wilfully make any false statement in any report required by the Act.

[15] Section 11 of the Clayton Act, 15 U. S. C. sec. 21, authorizes the Commission to issue orders against persons who have violated Sections 2, 3, 7, or 8 of the Clayton Act.

recommendations, the functions conferred upon the Commission were also of an advisory nature, designed only to supplement existing sanctions for the enforcement of the Sherman Act and the powers and jurisdiction which that Act vested in the Attorney General and in the courts to institute and to entertain the judicial proceedings authorized therein.

Petitioners contend that if investigation and report by the Federal Trade Commission under Section 5 of the Webb-Pomerene Act is not a substitute for the judicial proceedings authorized by the Sherman Act against those who violate its provisions, there would result an unlikely grant by Congress of "concurrent" jurisdiction to the Commission and to the courts respecting violations of the Act by export associations. But the policy considerations against a grant of concurrent jurisdiction suggested by petitioners (Br. 41–42) appear insubstantial in view of the express grant by Congress, four years earlier, of true concurrent jurisdiction to enforce certain provisions of the Clayton Act.[16] This grant of concurrent jurisdiction has stood unchanged for 30 years.

In addition, since the Commission is merely authorized to make "recommendations" and no

[16] Section 11 of the Act authorizes the Federal Trade Commission to enforce certain sections of the Act by means of administrative proceedings and Section 15 vests in the federal district courts jurisdiction of suits, brought by the Attorney General, to prevent and restrain any violation of the Act.

penalty is provided for non-compliance, the so-called jurisdiction of the Commission and the jurisdiction which the courts exercise over suits to enforce the Sherman Act operate in different planes; in no real sense is there concurrent jurisdiction. In any event, duplication of effort by two branches of the Government or a "race of diligence" would rarely, if ever, occur.[17] It is perhaps pertinent that the facts which led to the present suit were developed by investigations made by the Department of Justice and did not, directly or indirectly, grow out of any prior investigation by the Commission.

C. *The Provisions for Enforcement of the Sherman Act are not Repealed, as to Export Associations, by the Webb-Pomerene Act, nor does that Act make Application of these Provisions to such an Association Conditional upon the Happening of the Various Contingencies under which the Commission may refer to the Attorney General its "Recommendations" Concerning the Business of the Association*

Petitioners construe the statute (Br. 36–37) as meaning that, as to export associations, there

[17] Where the Commission had begun an investigation the Attorney General would not ordinarily commence judicial proceedings until the Commission's investigation and report had been completed and we assume that the Commission would not first start an investigation after the Attorney General had brought suit under the Sherman Act against an export association.

can be no civil or criminal proceeding by the Attorney General and no triple-damage suit or suit for injunctive relief by any other injured person, all as authorized by the Sherman Act or the Clayton Act, unless and until the following have occurred—

(1) The Commission has made an investigation;

(2) It has concluded that "the law" has been violated;

(3) It has made "recommendations" for bringing the association's business into conformity with law;

(4) The Association has not complied with these recommendations; and

(5) The Commission has referred its recommendations to the Attorney General.

Congress has provided four remedies for enforcement of the Sherman Act. Petitioners concede that if their construction of the Webb-Pomerene Act is adopted, the application of all of these remedies to export associations is suspended and rendered conditional. The present case involves the asserted bar interposed by the Webb-Pomerene Act against an equity proceeding by the United States under Section 4 of the Sherman Act.[18] Petitioners recognize (Br. 54) that whatever barrier the Webb-Pomerene Act im-

[18] Petitioners can find nothing in the Webb-Pomerene Act indicating that it bars civil or criminal proceedings for violation of Section 2 of the Sherman Act. Petitioners are there-

poses, with respect to export associations, against equity proceedings by the United States applies equally to criminal proceedings.[19] And although no language of the Webb-Pomerene Act points even remotely to the barring of suits by injured private persons, petitioners, apparently recognizing the inconsistency in result if proceedings by the United States alone were barred, construe the bar as also extending to suits by private persons (Br. 45–46).

Section 1 of the Sherman Act declares that any person who engages in a combination in restraint of interstate or foreign commerce is guilty of a misdemeanor. An export association which, by acts not given exemption by Section 2 of the Webb-Pomerene Act, engages in such conspiracy commits a misdemeanor unless Section 1 has been repealed as to such association. The Webb-Pomerene Act does not expressly so provide; and if there is a repeal, it must be by implication.

Civil proceedings for enforcement of the Sherman Act would also be repealed, at least *pro tanto*, under petitioners' construction. Section 4 of the

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fore at somewhat of a loss to explain why the alleged barrier to proceedings should operate against those for violation of Section 1 of the Act but not against those for violation of Section 2 (Pet. Br. 56–57).

[19] This Court, in discussing a like situation under another statute, said that it would be "strange indeed" if Congress, while prohibiting injunctive relief against certain conduct, had permitted it to be the basis for criminal liability. *United States* v. *Hutcheson*, 312 U. S. 219, 235.

Act confers upon federal district attorneys the unqualified power and duty, under the direction of the Attorney General, to bring proceedings to prevent violations of the Sherman Act, and it confers upon federal district courts unqualified jurisdiction of such proceedings. If the Webb-Pomerene Act renders this jurisdiction contingent, Section 4 has, in substantial measure, been repealed. The same would be true of the suits by persons other than the United States, authorized by Section 7 of the Sherman Act and Section 16 of the Clayton Act.

Petitioners describe the jurisdiction which the courts may exercise under their construction of the Webb-Pomerene Act as "consecutive" to the so-called jurisdiction of the Commission (Br. 41). But under petitioners' construction the court's jurisdiction is not merely "consecutive", i. e., conditional; it is, in addition, restricted to passing upon violations of the Sherman Act previously found by the Commission. If Congress intended to make the Commission the final arbiter of violations of the Sherman Act when reference of the Commission's recommendations to the Attorney General does not eventuate, Congress certainly did not intend to make the Commission's determination a nullity when court proceedings do result from such reference. Only if this is true would the supposed requirement of prior administrative determination have any meaning. Accordingly,

acceptance of petitioners' construction leads to the conclusion that, while the Attorney General may prosecute or not and the courts may enjoin or not acts which the Commission has found to be in violation of law, the Attorney General may not seek, and the courts may not grant, relief against acts not found by the Commission to be illegal. The Attorney General and the courts would operate, in other words, as mere agencies for enforcing the Commission's determinations; and the long-continued policy of leaving violations of the Sherman Act to judicial determination would, as to violations of the Act by export associations and their members, be reversed.

Since petitioners' interpretation would mean that the Webb-Pomerene Act has substantially abrogated the sanctions and remedies of the Sherman Act, petitioners may appropriately be called upon to show, as some evidence that Congress so intended, that the Webb-Pomerene Act provides an adequate substitute for the remedies which it nullifies. Examination of the statute discloses, however, that the alleged substitute provided therein is wholly inadequate. Under it, no criminal penalty for violation of the Sherman Act, no matter how flagrant the violation, may be imposed upon an export association. If the Commission determines, upon adequate or inadequate investigation of the facts or upon a correct or incorrect interpretation of the law, that an association has

not violated the Sherman Act, its operations remain immune. Even in the one circumstance in which judicial proceedings may be brought, non-compliance with recommendations made by the Commission, the association is not bound by the Commission's findings of fact made on the basis of supporting evidence.[20] Moreover, the Commission's investigation under the Webb-Pomerene Act may be and appears intended to be, *ex parte*. Conclusions arrived at in such an *ex parte* investigation might not even be admissible in evidence. Cf. *United States* v. *International Harvester Co.*, 274 U. S. 693, 703–704.

Prior to the Webb-Pomerene Act, Congress had, as to certain matters, authorized the Federal Trade Commission to make administrative determinations which should be binding upon the courts if not erroneous in point of law. When it did so, Congress provided in detail for the filing by the Commission of a written complaint, answer by the person against whom the complaint issued, hearings for the taking of evidence offered by both

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[20] Cf. Section 5 of the Federal Trade Commission Act, 15 U. S. C. sec. 45, and Section 11 of the Clayton Act, 15 U. S. C. sec. 21.

When Section 5 of the Webb-Pomerene Act provides that if an association fails to comply with the Commission's recommendations, the Commission shall refer its "findings" and recommendations to the Attorney General, the word "findings", not previously used in Section 5, apparently means findings of non-compliance with the recommendations, not findings of the association's price practices.

parties, designation of the courts authorized to review the Commission's determination, and the scope of judicial review permitted. See Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act.

A fair test of petitioners' construction of Section 5 of the Webb-Pomerene Act is to compare its provisions, on the one hand, with the foregoing procedure established by Congress when it did intend to confer upon the Federal Trade Commission the power of administrative determination and to compare its provisions, on the other hand, with those of Section 6 (e) of the Federal Trade Commission Act (*supra*, p. 30) when Congress was conferring upon the Commission solely investigatory and advisory powers. Section 5 is totally alien, in structure and content, to the former statutory provisions; it fits the latter like a glove.

D. *The Legislative History of the Webb-Pomerene Act Strongly Tends to Refute Petitioner's Construction of the Statute*

Two conclusions to be drawn from the legislative history of the Webb-Pomerene Act are of great significance. One is that Congress was as much concerned to safeguard domestic trade against restraint by combinations formed to promote export trade as it was to legalize the marketing of American goods in foreign countries through common sales agents. The other is that although Congress extensively debated and sev-

eral times amended the provisos limiting the declared exemption from the Sherman Act, the provisions of Section 5 upon which petitioners rely received almost no notice and were not changed after they had once been included in the bill. The theory that Section 5 drastically limits enforcement of the Sherman Act against export associations which engage in activities not immunized by the Webb-Pomerene Act, is difficult to reconcile with these facts.

The Webb-Pomerene Act had its genesis in a two-volume report entitled "*Cooperation in American Export Trade*" submitted to Congress by the Federal Trade Commission on June 30, 1916.[21] A bill to carry out the Commission's proposals was favorably reported by the House Judiciary Committee in August, 1916.[22] The structure and general provisions of this bill are the same as that finally adopted, except (1) the exemption from the Sherman Act given by Section 2 was limited by only one short proviso and (2) the bill did not include the last two paragraphs of Section 5 or any equivalent thereof.[23] After the bill had passed the House with minor amendments the Senate Committee on Interstate Commerce favorably reported it, with amendments (1) expanding the proviso in Section 2 into two

[21] The Commission made this report pursuant to Section 6 (h) of the Federal Trade Commission Act.

[22] H. Rep. No. 1118, 64th Cong., 1st sess.

[23] Serial 48, 64th Cong., 1st sess., pp. 82–83.

provisos and (2) adding the last two paragraphs of Section 5.[24]

The Senate failed to act on the bill in the 64th Congress but in the next Congress a bill incorporating the changes made by the Senate Commerce Committee was favorably reported by both the House Judiciary Committee and the Senate Commerce Committee[25] and was adopted, after minor amendments, by both branches of Congress.

The two-volume report of the Federal Trade Commission from which sprang the bill recommended legalizing cooperative action by American manufacturers and producers with respect solely to export trade, upon the grounds that such cooperation was prevented by the prevailing doubts as to its legality and that American producers and manufacturers were at a disadvantage in competing, individually, in foreign markets with large combinations of foreign producers and in bargaining with large combinations of foreign buyers.[26] The report at the same time stressed that there was serious danger that combinations to promote export trade "will exploit consumers in the home market and oppress their American competitors in the export trade" (*Id.*, p. 376). The report stated:

[24] S. Rep. No. 1056, 64th Cong., 2d sess., pp. 2, 3–4.

[25] H. Rep. No. 50, 65th Cong., 1st sess., pp. 1, 3–4; S. Rep. No. 109, 65th Cong., 1st sess.

[26] *Cooperation in American Export Trade*, vol. 1, pp. 370–375.

> The safeguard to the interests of the domestic consumer against any artificial stifling of domestic competition through combinations or unfair practices lies in the enforcement of the present antitrust laws, such as the Sherman Act and the Clayton Act, and of the Federal Trade Commission act. * * * In other words, it is no part of the proposal of the Commission to suffer export combinations to be used as a blind to cover attempts to restrain trade at home. The legislation must be framed so that any such attempt shall remain subject to the full rigors of the antitrust laws.

The report of the House Judiciary Committee on the bill introduced to carry out the Commission's proposal expressed the same purpose to assure full application of the antitrust laws to restraints of domestic trade by export associations and their members. The report said:[27]

> The bill is drawn so as to leave in full force our antitrust laws as applied to our own markets and as affecting different American exporters in their dealings with each other. * * *
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> * * * * * *
>
> The bill does not authorize any violation of the present antitrust laws. * * *

The same committee, when it reported in the next Congress a bill containing the provisions of

[27] H. Rep. No. 1118, 64th Cong., 1st sess., p. 3.

Section 5 on which petitioners rely, repeated the above declarations, quoting in full its earlier report.[28]

The sponsors of the bill in the two Houses, Representative Webb and Senator Pomerene, emphasized the same thought.

Senator Pomerene said:[29]

> It [the bill] does not repeal, it does not affect the Sherman law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned beyond territorial lines.

At another point the Senator said that "this bill does not repeal the Sherman law" and that associations not staying within the immunity given by Section 2 "violate the law of the land" (*idem.*, p. 172), and that such an association "would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice" (*idem.*, p. 170).

Like views were expressed by Congressman Webb at a time when the last two paragraphs of Section 5 were included in the bill. He said that the language of the provisos of Section 2 "is a perfect preservation of the Sherman law in all of its virility within the confines of this country",[30] and that associations straying beyond the con-

[28] H. Rep. No. 50, 65th Cong., 1st sess., pp. 2–3.

[29] 56 Cong. Rec., pt. 1, p. 173.

[30] 56 Cong. Rec., pt. 5, p. 4724.

fines of their immunity "are liable both under the Federal Trade Commission law and the Sherman antitrust law".[31]

If Congress had intended that Section 5 should effect a major inroad on application of the Sherman Act to restraints of trade by export associations not within the immunity given by the Webb-Pomerene Act, some consideration or notice of this would be found in the Committee reports and Congressional debates. That Congress did not so intend is attested by the absence (except for the Senate colloquy quoted *infra*, pp. 46–47) of such consideration or notice.

The explanation given by the Senate Committee on Interstate Commerce as to its reasons for adding the last two paragraphs of Section 5 is revealing. The committee reported:[32]

> Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, so that they may determine whether and to what extent the laws have been violated.

[31] 55 Cong. Rec., pt. 4, p. 3579.

[32] S. Rep. No. 1056, 64th Cong., 2d sess., pp. 3–4.

> For this reason the committee suggests the amendment at the close of section 5, which reads as follows:[33]

It thus appears that the primary purpose of these provisions was to clothe the Commission with power to investigate the acts and agreements of export associations "beyond the territorial limits of the United States" which might injuriously affect our commerce by means other than "unfair methods of competition". In this connection it was natural to utilize the broad powers of obtaining information which the Federal Trade Commission Act gave to the Commission, powers which Section 5 of the Webb-Pomerene Act made applicable to the Commission's investigations of export associations.[34] Particularly as to acts beyond the territorial limits of the United States might the broad investigatory powers of the Commission be of assistance in unearthing illegal conduct.

The objective of any such investigation by the Commission would be to determine "whether and to what extent the laws have been violated". Formulation of the Commission's conclusions and submission to the association concerned as a basis

[33] Following the committee's quotation of the new paragraphs it briefly summarized their provisions.

[34] Congress had given the Attorney General no power to subpoena witnesses or documents although it is true that grand juries investigating violations of the Sherman Act have such power.

for corrective action by it, as provided by Section 5, were likewise appropriate. But such authority and procedure do not make action under Section 5 a condition precedent to exercise by the Attorney General of his duty, under the Sherman Act, to enforce its provisions or a condition precedent to exercise by the courts of their statutory jurisdiction to entertain proceedings to enforce that Act.

Senator Pomerene directly expressed the opinion that action by the Commission under the Act would not be controlling upon the Attorney General, as shown by the following colloquy (55 Cong. Rec., pt. 3, p. 2788):

> Mr. POMERENE. * * * Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.
>
> Mr. WEEKS. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?
>
> Mr. POMERENE. *It might do that.*
>
> Mr. KELLOGG. Mr. President——
>
> Mr. POMERENE. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose

> of this bill—I think it is pretty clear, at least it is clear to my own mind, that the criminal penalties under the Sherman anti-trust law would not apply to these foreign contracts or associations.[35] [Italics supplied.]

If, as Senator Pomerene thought, the Attorney General would not be bound by the Commission's affirmative action under the Webb-Pomerene Act, the Commission's mere inaction, as in the present case, would not deprive the Attorney General of his statutory authority and duty to enforce the Sherman Act or deprive the courts of their statutory jurisdiction of suits to enforce that Act.

In the debates on the bill there can be found statements that export associations would be subject to the "supervision", "control", or "jurisdiction" of the Commission. The Act does give the Commission a measure of supervision, control, or jurisdiction over export associations, but the use in debate of such general terms are of little aid in resolving the issue presented in this case, whether the Commission was given a jurisdiction which is exclusive as against that of the Attorney General and the courts.

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[35] The doubt expressed as to the application of the criminal penalties of the Sherman Act to foreign contracts is to be taken as a doubt concerning the scope of the substantive prohibitions of that Act rather than as an intimation that the Webb-Pomerene Act narrowed the scope of these prohibitions.

E. *In Analogous Situations a Statutory Grant of Administrative Authority Has Been Held Not to Confer Upon the Administrative Agency Primary Jurisdiction of Violations of the Sherman Act*

The question whether Congress has granted to an administrative body primary jurisdiction to determine whether persons who are subject to administrative authority have violated the Sherman Act depends upon the intent of Congress. This question has already been considered from the standpoint of the language and structure of the Webb-Pomerene Act and of its pertinent legislative history. It is also appropriate to consider, as bearing upon the intent of Congress, the evils with which the applicable legislation is concerned and the means adopted by Congress for dealing with them.

The Sherman Act is unique in that it embraces the entire gamut of agreements or combinations "unduly restricting competition or unduly obstructing the due course of trade",[36] interstate or foreign, and of monopolization or attempted monopolization of such commerce. All such restraints and combinations are within the Act's scope but its prohibitions are defined only in general terms. This Courts has said (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489):

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[36] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 500.

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, * * *.

The Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360.

The statute is the exact opposite of one prescribing a detailed code of conduct for a particular kind of trade or commerce, administration of which is ordinarily committed to an administrative body, e. g., railroads, shipping, radio communication, stock exchanges and the security business, public stockyards, bituminous coal, etc. The Webb-Pomerene Act, although confined to export trade, deals with this trade only in the negative fashion of giving it a limited exemption from the Sherman Act."[37]

In view of the character of the prohibitions of the Sherman Act and of their enforcement it is not surprising that this Court has declined to construe legislation providing for exercise of ad-

[37] Requirements for filing certain information are not a prescription of conduct in export trade.

ministrative authority as impliedly conferring, as to violations of the Sherman Act, exclusive primary jurisdiction in the administrative body. The case most directly pertinent is *United States* v. *Borden*, 308 U. S. 188.

In that case an indictment under the Sherman Act charged certain distributors of milk, an agricultural cooperative association, and others with conspiring to fix the prices which distributors paid to producers and the prices at which distributors sold, on milk shipped into the Chicago market. The agricultural cooperative claimed exemption from prosecution under Sections 1 and 2 of the Capper-Volstead Act, 7 U. S. C. secs. 291, 292. This Court held (pp. 204–205) that the acts charged in the indictment were beyond the immunity conferred by Section 1 of the Act, which legalized collective marketing by the members of agricultural cooperatives organized as provided in the section. The case, like the present one, therefore involved a statute granting a limited exemption from the Sherman Act and acts in excess of those given exemption.

Section 2 of the Capper-Volstead Act, like Section 5 of the Webb-Pomerene Act, authorized action by an administrative agency directed toward enforcement of the limitations placed by Congress on the statutory exemption. Section 2 provided that if the Secretary of Agriculture has reason to believe that any cooperative association "monopo-

lizes or restrains" interstate trade to such an extent that the price of any agricultural product is thereby "unduly enhanced", he shall serve upon the association a complaint, hold a hearing for the taking of evidence, and, if he finds his charge sustained, issue a cease and desist order which shall recite the facts found by him. Jurisdiction is given to the district courts to enforce such orders.

This Court rejected the conclusion of the district court that the Act gave to the Secretary "exclusive jurisdiction" to determine, "in the first instance", whether a cooperative was illegally monopolizing or restraining trade and that, until the Secretary acts, "the judicial power cannot be invoked." This Court said (p. 206):

> We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a pro-

> ceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, * * *.

The reasons for the Court's conclusion apply here. The Webb-Pomerene Act also "does not cover the entire field of the Sherman Act." It also "provides only for a civil proceeding". As to acts prohibited by Section 2 of the Sherman Act, the lack of coverage by the Webb-Pomerene Act is complete instead of, as under the Capper-Volstead Act, only partial. It likewise, with reference to the authorized administrative action, "contains no provision giving immunity from the Sherman Act in the absence of a proceeding" thereunder.[38]

The provisions of the Capper-Volstead Act for a "complaint", a "hearing", and an "order" enforceable by specified procedure are those appropriate to an administrative determination of a kind sometimes called quasi-judicial. Cf. *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1. Pre-

[38] Congress, when wishing to create exemptions from the Sherman Act, has repeatedly done so by clear and explicit language. Among many illustrations of this, see, in addition to Section 2 of the Webb-Pomerene Act, Interstate Commerce Act, sec. 5 (11), 49 U. S. C. sec. 5 (11); Agricultural Adjustment Act, Sec. 8b, 7 U. S. C. sec. 608b; Bituminous Coal Act of 1937, Sec. 4 (d), 15 U. S. C. sec. 832 (d); Shipping Act, 1916, Sec. 15, 46 U. S. C. sec. 814.

sumably at least, Congress in creating such a determination would intend it to have a wider scope and effect than that to be given to an *ex parte* investigation and determination of the kind authorized by the Webb-Pomerene Act (see *supra*, p. 38). Since the Capper-Volstead Act did not give the Secretary of Agriculture exclusive primary jurisdiction over violation of the Sherman Act by agricultural cooperative associations, it would seem to be an *a fortiori* conclusion that the Webb-Pomerene Act does not give the Federal Trade Commission such jurisdiction as to export associations.

Even where Congress has established as detailed and inclusive administrative regulation as it has for the railroads under the Interstate Commerce Act, they may be proceeded against for violation of the Sherman Act if the Interstate Commerce Commission does not have authority to prohibit the particular conduct alleged to be in violation of the Sherman Act. *Georgia* v. *Pennsylvania Railroad Co.*, decided March 26, 1945; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290. See *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 161–162. Compare *Nat. Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 222–224.

Under the doctrine of *Georgia* v. *Pennsylvania Railroad Co.*, *supra*, and prior cases, that a pro-

ceeding under the Sherman Act involving its application to commerce for which Congress has provided administrative regulation is not barred if the administrative body is not authorized to prohibit the particular conduct complained of, it follows that the provisions of Section 5 of the Webb-Pomerene Act are not a bar to the present proceedings. That Act gives the Federal Trade Commission no power to prohibit violations of the Sherman Act by export associations. All that the Commission is authorized to do is to investigate and recommend. The only effect of its recommendation is (1) possible acquiescence therein by the offending association and (2), if petitioners' view of the statute is accepted, removal of a barrier against bringing a proceeding under the Sherman Act. Even under petitioners' view, therefore, the statute authorizes prohibition, relief, or remedy by administrative action only in the sense that exercise of the granted administrative authority removes a ban on judicial proceedings, which ban the grant of such authority has itself created. To term this an administrative remedy involves a curious *non sequitur*. We submit that something more substantial is required in order to establish that "Congress intended to create 'so great a breach in historic remedies and sanctions' "! (*United States* v. *Borden*, 308 U. S. 188, 198).

CONCLUSION

For the reasons stated, the writs of certiorari should be dismissed. If, however, the Court should determine otherwise, we submit that the order under review should be affirmed.

HUGH COX,
Acting Solicitor General,
WENDELL BERGE,
Assistant Attorney General;
CHARLES H. WESTON,
HERBERT A. BERMAN,
HERBERT BORKLAND,
Special Assistants to the Attorney General.

APRIL 1945.

APPENDIX

The Webb-Pomerene Act of April 10, 1918

SEC. 1. The words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

* * * * * * *

The word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

SEC. 2. Nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the

United Stafes, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further,* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

* * * * *

SEC. 5. Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require

as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon

such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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SUPREME COURT OF THE UNITED STATES.

Nos. 1016, 1017.—October Term, 1944.

United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., et al., Petitioners,
1016 *vs.*
The United States of America.

California Alkali Export Association, West End Chemical Co. (Inc.), Pacific Alkali Co., (Ltd.), Petitioners,
1017 *vs.*
The United States of America.

On Writs of Certiorari to the District Court of the United States for the Southern District of New York.

[May 21, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a suit in the District Court for Southern New York, brought by the United States under § 4 of the Sherman Anti-trust Act, 15 U. S. C. § 4, to restrain violations of the Act. The defendants, who are petitioners here, are two incorporated export associations, thirteen domestic members of one or the other, and a British corporation and its American subsidiary, all of which are producers of alkalies. The bill of complaint alleges that petitioners are engaged in a conspiracy to eliminate exports of alkalies to the United States by the foreign members of the conspiracy; to restrict or eliminate exports of alkalies by domestic producers from the United States to many world markets; to prevent independent domestic producers from competing with petitioners in the export of alkalies; to restrict their production of alkalies in the United States; and to fix prices of caustic soda in the United States, all in violation of §1 of the Sherman Act, 15 U. S. C. §1.

The district court denied, 58 F. Supp. 785, petitioners' motion to dismiss the complaint, made on the ground that exclusive jurisdiction of the matters charged in the complaint is vested in the first instance in the Federal Trade Commission, under §§ 1, 2, and 5 of the Webb-Pomerene Act of April 10, 1918, c. 50, 40 Stat. 516, 15

U. S. C. §§ 61, 62, 65. Petitioners then filed here petitions for certiorari under § 262 of the Judicial Code, 28 U. S. C. § 377, seeking review of the order of the district court denying the motion to dismiss.

The questions for decision are (1) whether the order of the district court, denying petitioners' motion to dismiss the complaint, may appropriately be reviewed here by writ of certiorari issued under § 262 of the Judicial Code and, if so, (2) whether §§ 1, 2 and 5 of the Webb-Pomerene Act confer primary jurisdiction on the Federal Trade Commission, exclusive of that of the District Court, to pass upon alleged violations of the Sherman Act by export associations.

Section 4 of the Sherman Act invests the several district courts with jurisdiction to restrain violations of the Act; and it imposes on district attorneys of the United States, under the direction of the Attorney General, the duty to institute suits in equity in their respective districts, to restrain such violations. But § 2 of the Webb-Pomerene Act exempts from the prohibitions of the Sherman Act, associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" and also any "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." To this is added a second proviso "that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

The first paragraph of § 5 of the Webb-Pomerene Act requires each association engaged solely in export trade to file with the Federal Trade Commission a statement giving information concerning its officers and stockholders or members, and its place of business, and a copy of its articles of incorporation or its contract of association; the association is required to refile annually such statements with suitable corrections, and to furnish such further specified information as the Commission may from time to time request. Section 5 further provides in its second para-

graph that whenever the Commission shall have reason to believe that an export association is violating the Sherman Act in the ways excepted by the provisos of § 2 from its exemptions, the Commission shall conduct an investigation into the alleged violations. If "it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law." If the association fails to comply with the recommendations of the Commission, it "shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."[1]

Petitioners do not question the district court's rulings, in denying their motion, that the complaint alleges violations of the Sherman Act, and that under its allegations petitioners are not within any immunity from the Sherman Act secured by § 2 of the Webb-Pomerene Act. Their sole contention on the merits is that § 5 of the latter Act, by authorizing the proceedings before the Federal Trade Commission, deprives the district courts of jurisdiction in Sherman Act cases until the Commission has made its investigation and recommendations, the associations have failed to comply with them, and the Commission has referred its findings and recommendations to the Attorney General.

I.

Petitioners argue that this Court may appropriately review the order of the district court by writ of certiorari, issued under

[1] The second paragraph of § 5 of the Webb-Pomerene Act, with which we are especially concerned, reads as follows:

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

§ 262 of the Judicial Code. They point out that § 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, governing appeals in Sherman Act cases, makes no provision for appeals from interlocutory orders or judgments, and provides that "an appeal from the final decree of the district court will lie only to the Supreme Court." See *United States* v. *California Canneries*, 279 U. S. 553. But it is urged that the district court is deprived of its jurisdiction by § 5 of the Webb-Pomerene Act, until the Trade Commission has made the investigation and followed the further procedure outlined by § 5; that the assertion by the district court of its jurisdiction, without awaiting an investigation by the Commission, will entail protracted litigation and impose on the parties great expense before the error can be corrected on appeal from the final judgment to this Court. All this will be avoided, it is said, by awaiting action by the Commission. Hence petitioners insist that the case is appropriate for the exercise by this Court of its extraordinary power to review the order of the district court by writ of certiorari.

Section 262 of the Judicial Code provides that the Supreme Court, circuit courts of appeals and the district courts, "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Under § 262, this Court has power, in aid of its appellate jurisdiction, to review judgments and orders of the district courts by resort to the common law writs of certiorari, mandamus and prohibition. *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268, and cases cited; *In re 620 Church Street Corp.*, 299 U. S. 24, 26, and cases cited; *Ex parte Peru*, 318 U. S. 578, and cases cited; *House* v. *Mayo*, No. 921, decided February 5, 1945, and cases cited; compare *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. These writs are granted or withheld in the sound discretion of the Court. See *Roche* v. *Evaporated Milk Assn.*, *supra*, 25, and cases cited. In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru*, *supra*, 584. But where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court.

The traditional use of such writs, both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *In re Chetwood*, 165 U. S. 443, 462 (citing Tidd's Prac. *398, and Bac. Ab., Certiorari); *Whitney* v. *Dick*, *supra*, 139-140; *Ex parte Peru*, *supra*, 583, and cases cited.[2] It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. *In re Tampa Suburban R. R. Co.*, *supra*; *Ex parte Harding*, 219 U. S. 363, 369; *Roche* v. *Evaporated Milk Assn.*, *supra*, 30-31, and cases cited; cf. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. *Roche* v. *Evaporated Milk Assn.*, *supra*, 30, and cases cited; and see *Cobbledick* v. *United States*, 309 U. S. 323.

But the present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated would, in the ordinary course, be reviewed on appeal from the final judgment. The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said

[2] See also Regina v. Yarrington, 1 Salk. 406, 91 Eng. Rep. 353 (Q. B. 1710); The King v. The Justices of the West Riding of Yorkshire, 5 T. R. 629, 101 Eng. Rep. 352 (K. B. 1794); The King v. The Justices of Somersetshire, 5 Barn. & Cress. 816, 108 Eng. Rep. 303 (K. B. 1826); The King v. Judge Clements [1932] 2 K. B. 535; The King v. Middlesex Justices [1933] 1 K. B. 72.

to be charged with the duty of enforcing the antitrust laws in the circumstances of the present case. If petitioners' motion was well founded, its denial operated to thwart the asserted purpose of Congress to afford to export associations, which overstep the bounds of the granted immunity, opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law. Exercise of its jurisdiction by the district court would preclude the Commission from carrying out its asserted functions of investigation, recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be corrected by recourse to the prescribed appeal procedure. It would be a frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance.

The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. The case is analogous to those in which this Court has, by writs issued under § 262, reviewed the action of district courts, alleged to be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal, see *In re Chetwood, supra; McClellan* v. *Carland, supra; Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9; *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142; *Colorado* v. *Symes*, 286 U. S. 510; or by which they have deprived a party of a trial by jury. *Ex parte Simons*, 247 U. S. 231; *Ex parte Peterson*, 253 U. S. 300, 305.

For these reasons we think the case is an appropriate one for review of the district court's order by certiorari, and we pass to the consideration of the merits.

II.

Petitioners do not deny that the allegations of the complaint are sufficient to charge violations of the Sherman Act not within the exemptions created by § 2 of the Webb-Pomerene Act. The contention is that since the alleged violations are being committed by and on behalf of export associations which have conformed to § 5 of the latter Act, the authority of the United States to maintain the suit is suspended until the Federal Trade Commission has proceeded against the associations by way of investigation and, if found appropriate, by way of recommendations to them and reference of its findings to the Attorney General, as specified in § 5.

It is conceded that § 5 contains no explicit restriction on the authority of the United States to institute antitrust suits in the normal way, nor any explicit requirement that resort be had to the Commission prior to the institution of such an antitrust suit. Petitioners argue that this is to be implied from the structure of the Act, which first, by § 2, exempts from the Sherman Act certain activities of export associations, with specified exceptions; and then by the second paragraph of § 5, gives the Commission authority, in language substantially identical with that of the exceptions in § 2, to investigate such activities as continue to be violations of the Sherman Act. It is argued that Congress, by authorizing the Commission to investigate violations and in appropriate cases to report to the Attorney General any violations found, has expressed the purpose that the action by the Commission and the Attorney General should be consecutive and not concurrent.

It would follow that however strong the evidence, and however clear the violation of the Sherman Act, the Attorney General must await the action of the Commission, which may or may not undertake to proceed with the case, and that in any event the Attorney General and the courts must abide by the Commission's determination that there are no violations to report. During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to institute antitrust suits, without prior proceedings by other agencies, became firmly established. A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may appropriately be brought,

would require a clear expression of that purpose by Congress. *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, 203-206; see also *Georgia* v. *Pennsylvania R. R. Co.*, No. 11, Original, decided March 26, 1945, p. 12 of slip opinion. The Webb-Pomerene Act, as we have said, contains no explicit indication to that end. Nor may such an implication be readily drawn from the language of the statutes, or their legislative history.

In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.

This is in marked contrast to the Commission's power to issue cease and desist orders with respect to violations of § 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45,[3] and with respect to violations of the Clayton Act, §§ 1, 3, 7, 8, 11, as amended, 15 U. S. C. §§ 13, 14, 18, 19, 21.[4] On the other hand, it is consonant with and closely related to another important function of the Commission, which from the beginning has had extensive powers to investigate and report on practices which concern or affect the enforcement of laws relating to trade and commerce, including the antitrust laws.[5] Such investigations by

[3] Section 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45, declares that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce," are unlawful.

[4] Section 1 of the Clayton Act, 15 U. S. C. § 13, prohibits certain discriminations in price and services; section 3, 15 U. S. C. § 14, certain sales or leases where the purchaser is required to refrain from dealing with competitors of the seller; section 7, 15 U. S. C. § 18, certain acquisitions by corporations of stocks in other corporations; and § 8, 15 U. S. C. § 19, certain interlocking directorates. Section 11, 15 U. S. C. § 21, confers on the Commission power to issue cease and desist orders with respect to violations of §§ 1, 3, 7 and 8.

[5] Section 6(e) of the Federal Trade Commission Act, 15 U. S. C. § 46(e), authorizes the Commission, in language comparable to that of § 5 of the Webb-Pomerene Act, "upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law." Section 6 further authorizes

the Commission have never been deemed prerequisite to antitrust suits by the United States; and there is nothing to suggest that Congress, in authorizing the Commission to investigate export associations, intended to place such investigations on any different footing than others, which the Commission had already been authorized to conduct.

It is suggested that Congress could not have contemplated "concurrent jurisdiction" of the Commission and the courts, because of the inconvenience to suitors in not being afforded an opportunity to mend their ways by following the Commission's recommendations. And petitioners urge that Congress could not have intended concurrent jurisdiction, since it explicitly provided for it when it so desired. Thus §§ 1, 3, 7, and 8 of the Clayton Act, as amended, 15 U. S. C. §§ 13, 14, 18, 19, may be enforced either by cease and desist orders of the Commission, § 11, 15 U. S. C. § 21, or by suits in equity instituted by the several district attorneys in their respective districts, under the direction of the Attorney General, § 15, 15 U. S. C. § 25.

This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation, or because the associations have satisfactorily corrected their trade practices. But the Commission does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only

the Commission to investigate the organization, business, practices and management of any corporation engaged in interstate commerce; to require such corporations to file annual and special reports and answers to questions concerning such matters; to investigate the manner in which corporations, defendants in Sherman Act suits brought by the Government, have complied with the decrees, and to transmit to the Attorney General its "findings and recommendations"; to investigate and report, upon the direction of the President or Congress, the facts relating to any "violations of the antitrust Acts by any corporation"; to investigate trade conditions in foreign countries where trade practices may affect our foreign trade, and to report to Congress its recommendations.

because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States.

But even if the case were one of concurrent jurisdiction, we cannot assume that there would be any unseemly conflict between the Commission and the Department of Justice. Congress has found no such objection to the concurrent jurisdiction to enforce the provisions of the Clayton Act to which we have referred. The two agencies will seldom act simultaneously. There would be no occasion for an investigation by the Commission if the Attorney-General had already procured the requisite evidence of violations and was ready to proceed with his suit, as is said to be the case here. And there is no basis for interpreting the statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice.

As we have said, the Webb-Pomerene Act's grant of power to the Commission would curtail the authority of the United States to conduct antitrust suits only if it were deemed to be an implied repeal *pro tanto* of § 4 of the Sherman Act. As we pointed out in *United States* v. *Borden Co.*, *supra*, 198-199, 203-206, such repeals by implication are not favored. There we held that provisions of the Capper-Volstead Act, 7 U. S. C. §§ 291, 292, comparable to those of §§ 2 and 5 of the Webb-Pomerene Act, did not operate to restrict the authority of the United States to maintain suits for violation of the antitrust laws.

Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, 7 U. S. C. §§ 291, 292, authorized collective marketing by members of agricultural cooperatives but empowered the Secretary of Agriculture to issue cease and desist orders, upon investigation and findings that any such cooperative associations monopolized or restrained interstate trade and commerce to such an extent that the prices of any agricultural products were thereby unduly enhanced. And the Act gave jurisdiction to the district courts to enforce the Secretary's orders.

This Court rejected the contention that the Capper-Volstead Act gave to the Secretary "exclusive jurisdiction" to determine in the

first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act. And we held for the same reasons, which are controlling here, that neither the language nor the structure of the Capper-Volstead Act indicated a Congressional purpose to make the procedure by the Secretary, which it established, either a substitute for or a prerequisite to a suit by the United States under the Sherman Act. *A fortiori* no such purpose is to be inferred from the Webb-Pomerene Act, which has withheld from the Commission any authority to enforce the Sherman Act.

Petitioners appeal to the familiar principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies. *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310-311; *Myers v. Bethlehem Corp.*, 303 U. S. 41, 51, and n. 9, and cases cited. And especially they urge that the Government may not proceed with the prosecution of a Sherman Act case until the relevant issues have been submitted to and passed upon by an administrative tribunal established by the Government to determine those issues. *See United States v. Pacific & Arctic Co.*, 228 U. S. 87, 106-108. To this the answer is, as already indicated, that the only function of the Federal Trade Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer.

Thus the words of the Webb-Pomerene Act and its setting lend no support to petitioners' contention. And there is nothing in its legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws. The precise problem presented by the present case was not referred to in the committee reports or the debates, except in a remark by Senator Pomerene, indicating that the Act does not preclude suits by the United States before the Commission has made its investigation.[6] But the absence of

[6] In response to a question by Senator Weeks, that "assuming . . . that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?", Senator Pomerene answered: "It might do that." 55 Cong. Rec. 2788.

more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal any portion of § 4 of the Sherman Act. And Congress's clear purpose to insure continued and vigorous application of the antitrust laws to domestic restraints of trade, notwithstanding the Webb-Pomerene Act, is shown by the Committee Reports[7] as well as by statements of the sponsors of the legislation on the floors of Congress,[8] and is a strong indication that there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits.

We conclude that the United States was authorized to bring this suit, and that the Commission's powers conferred by § 5 of the Webb-Pomerene Act do not preclude the suit before the Commission has acted. The order of the district court is therefore

Affirmed.

Mr. Justice ROBERTS concurs in this opinion in respect of this Court's exercise of jurisdiction under § 262 of the Judicial Code. He dissents from the decision that the District Court had power to hear the cause in the absence of an investigation and recommendation by the Federal Trade Commission.

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[7] H. Rep. No. 1118, 64th Cong., 1st Sess., p. 3; S. Rep. No. 1056, 64th Cong., 2d Sess., pp. 3-4. See also H. Rep. No. 50, 65th Cong., 1st Sess., pp. 1, 3; S. Rep. No. 109, 65th Cong., 1st Sess., pp. 3-4; Federal Trade Commission, Report on Cooperation in American Export Trade, (1916) Vol. 1, p. 376, *et seq.*

[8] Senator Pomerene said, 56 Cong. Rec. 173: "It [the bill] does not repeal, it does not affect the Sherman Law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned, beyond territorial limits." And he also said: "this bill does not repeal the Sherman law", and that associations not remaining within the immunity granted by § 2 "violate the law of the land." (p. 172.) He said further that such an association "would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice." (p. 170.) Congressman Webb, in discussing the amendment to § 5, said that the language of the provisions of § 2 "is a perfect preservation of the Sherman law in all of its virility within the confines of this country", 56 Cong. Rec. 4724, and that associations straying beyond the confines of their immunity "are liable both under the Federal Trade Commission law and the Sherman antitrust law." 55 Cong. Rec. 3579.